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SUBJECT: CONSTITUTIONAL COURT SETS HIGH HURDLES FOR ONLINE SEARCHES,
OVERTURNS RELEVANT STATE LAW

REF: DUESSELDORF 2

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¶1. (SBU) Summary: In a long-awaited landmark February 27 decision, the German Constitutional Court in Karlsruhe declared unconstitutional parts of a law allowing online searches, introduced in the state of North Rhine-Westphalia (NRW) in 2006. The court ruled that such searches interfere in an individual's personal freedoms under Article 2 of the German constitution and are therefore admissible only under very stringent conditions. Both civil libertarians and advocates of a more robust approach to combating terrorism touted the decision as a victory, although both camps still have reservations with parts of the ruling. The decision requires NRW lawmakers to draft legislation that meets the new legal standards, ending a period of legal limbo and paving the way for national legislation. End Summary.

NRW takes the heat as the first state regulating online searches

¶2. (U) The case goes back to constitutional complaints lodged with the Federal Constitutional Court by five NRW citizens (among them former Federal Interior Minister Gerhart Baum (FDP)) against a 2006 amendment to a NRW law authorizing the State Office for the Protection of the Constitution (OPC) to conduct online searches of hard drives on private PCs and to better monitor Internet communications of extremists, and in particular, terrorists. NRW was the first, and thus far only, state in Germany to develop specific legislation regulating such searches. Attacks on the state government for its forward leaning position on this matter, both by the SPD/Greens state parliament opposition and civil liberties/privacy advocates, increased after an October 2007 court hearing showed that the Karlsruhe judges had serious doubts concerning the law's constitutionality. After that hearing, a primary drafter of the NRW law told us he expected the Constitutional Court to overturn it (reftel).

Court defines "new basic right" and sees NRW regulation as violating it

¶3. (U) In presenting the key elements of the 106-page court decision, Chief Justice Hans-Juergen Papier stressed that the court had broken new ground by defining "for the first time a

basic right guaranteeing the privacy and integrity of IT systems." This new basic right derived from Article 2, para. 1 of the Basic Law (personal freedoms) in connection with its Article 1, para.1 (human dignity) and may only be restricted or interfered with under very stringent conditions (see below). The court ruled that the relevant NRW regulation violated this basic right and was therefore null and void. In particular, the clause authorizing the OPC to conduct online searches was too general and not clearly enough defined; did not fulfill the requirements of reasonableness; and did not contain sufficient provisions for protecting the core area of (a person's) privacy, the court found.

High hurdles for online searches

¶4. (U) According to the court, online searches are only admissible if:
-- there are actual indications of a concrete threat to an overridingly important object of legal protection, such as life, freedom or the existence of the state;
-- there is prior approval of the measure by a judge; and
-- the legislation authorizing online searches contains provisions protecting the core area of (a person's) privacy.

Reactions in NRW

¶5. (SBU) NRW Interior Minister Ingo Wolf (FDP), who pushed the forward looking OPC law, called the February 27 court ruling "a trailblazing" decision and gave assurances that the NRW law would be redrafted. The opposition called the ruling a "slap in the face" for Wolf, with the Greens going so far as to call for his resignation. The leading and most prominent complainant, Gerhart Baum, the former Federal Interior Minister under Chancellor Helmut Schmidt, expressed great satisfaction at the outcome, terming the decision "historic" and a "milestone" in the development of the protection of basic rights in the

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information age. In a February 28 conversation with CG, FDP Bundestag Internal Affairs Spokesperson Gisela Piltz called the ruling a "victory," but added that it still allows law enforcement authorities access to some personal space that she would have preferred not to see.

Comment

¶6. (SBU) The Constitutional Court's decision has implications that go far beyond the NRW regulation of online searches, providing a far-reaching concept for a new basic right guaranteeing the privacy and integrity of IT systems, and clearing the way for federal legislation on online searches. NRW authorities, who had taken the first stab in Germany at creating a legal basis for this new area, must now draft new legislation, and other states can be expected to follow. It is too early to assess the impact of the ruling for the work and effectiveness of intelligence and law enforcement agencies in their struggle against the terrorist threat. One senior Duesseldorf police officer welcomed it "for finally providing legal clarity," while another predicted that it would erode law enforcement agencies' ability to combat extremist targets on equal terms. The ruling's language referring to the "existence of a concrete danger" as a prerequisite for searches suggests that it may be easier for law enforcement agencies than intelligence services to use online searches as a tool. Perhaps for this reason, it is interesting to note that Federal Interior Minister Wolfgang Schauble has thus far talked primarily about amending the BKA (Federal Office of Criminal Investigation) law, which concerns law enforcement agencies, and not the federal OPC law. End Comment.

17. (U) This message was coordinated with Embassy Berlin.
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